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No. 09-1376

In the Supreme Court of the United States

ANGEL ENRIQUE VILLEDA ALDANA, et al.,
Petitioners,

v.

FRESH DEL MONTE PRODUCE, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the Eleventh Circuit, in applying this Court's well-settled standards for consideration of a *forum non conveniens* motion, properly weighed the evidence in this fact-bound and discretionary inquiry.

PARTIES TO THIS PROCEEDING

Angel Enrique Villeda Aldana, Oscar Leonel Guerra Evans, Rigoberto Alvayero Hernandez, Gumerzindo Loyo Martinez, Marel Martinez, Lyionhel Mcintosch Rodriguez, and Jorge Agustin Palma Romero, Petitioners

Fresh Del Monte Produce, Inc., Del Monte Fresh Produce Company, and Compañía De Desarrollo De Guatemala, S.A., Respondents

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Fresh Del Monte Produce, Inc. is a publicly traded company listed on the New York Stock Exchange and is the ultimate parent of Respondent, Del Monte Fresh Produce Company, and Respondent, Compañía de Desarrollo de Guatemala, S.A., via indirect ownership.

No public company owns 10% or more of any Respondent's stock.

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STATEMENT OF THE CASE

A. Introduction

This case presents the unremarkable question of whether the Court of Appeals and the district court, in explicitly considering and applying well-settled legal principles, accorded proper weight to the record evidence and properly balanced the *forum non conveniens* factors in dismissing the Petitioners' fourth amended complaint. In the face of this enormously fact-bound determination, the Petitioners strain to create the illusion of inter-circuit splits and important questions of federal law where neither exist. The Petition is in reality a last-ditch effort to have this Court reweigh the record evidence already twice examined and weighed by the Court of Appeals and the district court below.

There is no division among the circuits on any question the Petitioners present. This Court long ago established the legal principles applicable to a *forum non conveniens* inquiry, principles to which the Court of Appeals and the district court faithfully adhered. The federal courts consistently recognize this Court's longstanding admonitions that the touchstone of the *forum non conveniens* doctrine is flexibility, and that no one factor in the *forum non conveniens* analysis can be given singularly dispositive weight.

The Petitioners, however, suggest that some federal courts have elevated certain interest factors in the *forum non conveniens* mix above all others and have accorded these "favored" interest factors paramount weight. That, of course, is not the law in any federal circuit and there is no conflict. No federal court has

ever suggested that any one factor in a *forum non conveniens* analysis is to have the overriding weight the Petitioners would hope to assign, and doing so would contravene the legal principles this Court long ago established and which lie at the very heart of the *forum non conveniens* doctrine. In short, none of the Petitioners' three arguments has merit.

The Petitioners first argue, entirely without support, that a *forum non conveniens* dismissal of their claims for mental torture under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 (note), is overwhelmingly disfavored and further argue that the Court of Appeals failed to follow this so-called rule in conflict with decisions of the Second and Ninth Circuits. *See* Petition for Writ of Certiorari ("Petition") at 9-13. Not surprisingly, the case law the Petitioners cite is wholly inapposite or contradicts their distorted view and plainly reveals that no such rule exists.

The Petitioners next assert, improperly for the first time in the Petition, that when a case is pending in a domestic defendant's home forum, the United States has an overwhelming interest in the accountability of its citizens sufficient to overcome the combined weight of all other *forum non conveniens* interests. *See id.* at 13-17. The Petitioners' argument is not only untimely, it is contrary to settled law. Again, Petitioners fail to cite any authority supporting their claimed inter-circuit conflict or any other basis to warrant this Court's review.

Finally, the Petitioners contend that because the Petitioners are U.S. residents who were granted asylum due to the alleged incidents giving rise to their

ATS and TVPA claims, the Court of Appeals, in a "clear split with other circuits," failed to give adequate weight to the Petitioners' choice of forum. *See id.* at 17-20. The Petitioners, of course, fail to identify any split among the circuits. Moreover, the Court of Appeals explicitly acknowledged the Petitioners' U.S. residency and accorded their forum choice the heightened deference it was due pursuant to this Court's well-settled *forum non conveniens* jurisprudence. Further, because the narrow set of factual circumstances the Petitioners portray will so rarely occur, and the question is of importance to the Petitioners only, as opposed to the public as a whole, there is nothing to warrant this Court's review.[1]

In sum, the Petitioners' real quarrel is with the discretionary balancing determination of the district court and the appropriately deferential review of the Court of Appeals, which found that, in this record, the *forum non conveniens* interests the Petitioners emphasize were substantially outweighed by the remaining private and public interests taken as a whole. The Court of Appeals' and the district court's decisions are in perfect harmony with applicable legal principles and the decisions of other federal courts applying *forum non conveniens* to ATS and TVPA claims.

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[1] In addition, the Petitioners' request for "clarification" based on a presumed need for the district court to protect their safety is a red herring. The district court in this case directly addressed the Petitioners' safety concerns when it expressly conditioned its dismissal upon the Petitioners' "right to seek reconsideration if any of the [Petitioners] are required to appear in person in Guatemala to litigate their claims." *See* Petition, App. at B-12.

Accordingly, the Petition should be denied.

B. Course of Proceedings

On August 2, 2001, some of the Petitioners filed a Complaint for Equitable Relief and Damages ("Complaint") in the United States District Court for the Southern District of Florida against Respondent, Fresh Del Monte Produce, Inc. The twelve-count Complaint alleged claims under the ATS, the TVPA, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et. seq.* ("RICO"), together with numerous pendent non-federal law claims arising out of an altercation that occurred in Guatemala on October 13-14, 1999.

On February 5, 2003, after several amendments and joinder of new parties, the Petitioners filed a Third Amended Complaint for Equitable Relief and Damage ("Third Amended Complaint"), alleging the same twelve counts against Respondents, Fresh Del Monte Produce, Inc. ("FDMPI"), Compañía de Desarrollo Bananero de Guatemala, S.A. ("Bandegua"), and Del Monte Fresh Produce Company ("DMFPC") (collectively "Respondents").

In April 2003, Respondents filed a Consolidated Motion to Dismiss Third Amended Complaint (1) for Lack of Subject Matter Jurisdiction, (2) for Failure to State Claims Upon Which Relief Can Be Granted, (3) for *Forum Non Conveniens*, and (4) for Lack of Personal Jurisdiction on behalf of Bandegua.

On June 4, 2003, the district court denied Respondents' *forum non conveniens* motion, but on December 12, 2003, dismissed without prejudice the

Petitioners' Third Amended Complaint for lack of federal subject matter jurisdiction.[2] The district court expressly granted the Petitioners leave to file another amended complaint. However, instead of amending, the Petitioners strategically chose to appeal the district court's subject matter jurisdiction order and simultaneously file their non-federal claims in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida (hereinafter the "State Court Action").

The Petitioners' State Court Action was against the same defendants and asserted common-law tort claims based on the identical facts and circumstances alleged in the Third Amended Complaint. The Respondents moved, *inter alia*, to dismiss Petitioners' State Court Action pursuant to the doctrine of *forum non conveniens*.

On March 30, 2005, after jurisdictional and *forum non conveniens* discovery in the State Court Action, and upon consideration of the legal memoranda and evidence submitted by the parties, including expert affidavits and depositions, the state court dismissed the Petitioners' State Court Action in favor of Guatemala pursuant to the doctrine of *forum non conveniens*. The state court found, in relevant part:

> An adequate alternate forum exists for these Plaintiffs in Guatemala and Guatemala possesses jurisdiction over the entire case, including all of the parties. . . . The private interest factors

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[2] The Petitioners' RICO claim was dismissed with prejudice.

> weigh heavily in favor of the Guatemalan forum [and] . . . the public interest factors also heavily favor the Guatemalan forum. . . .
>
> This dispute, involving as it does one of Guatemala's largest private employers in one of Guatemala's most important economic sectors and one of Guatemala's largest and most influential labor unions, *is a quintessentially Guatemalan dispute*.

Villeda Aldana v. Fresh Del Monte Produce, Inc., No. 04-00723 CA 20, slip op. (Fla. Cir. Ct. Mar. 30, 2005) (emphasis added), appended hereto as Appendix 1, at 2b-5b. The state court expressly conditioned its *forum non conveniens* dismissal on the Petitioners not being required to be physically present in Guatemala to testify or litigate their claims. *Id.* at. 5b-6b. The Petitioners appealed the state court's *forum non conveniens* dismissal and the Florida Third District Court of Appeal affirmed. *Aldana v. Fresh Del Monte Produce Inc.*, 922 So. 2d 212 (Fla. Dist. Ct. App.), *rev. dism.*, 928 So. 2d 334 (Fla. 2006).

On July 8, 2005, the Eleventh Circuit rendered its opinion in the Petitioners' initial appeal in Case No. 04-10234-HH concerning the district court's subject matter jurisdiction dismissal order. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), *cert. denied*, 549 U.S. 1032 (2006) (hereinafter, "*Aldana I*"). The Court of Appeals affirmed the dismissal of all of the Petitioners' claims for lack of federal subject matter jurisdiction, with the exception of the Petitioners' ATS and TVPA claims alleging torture based on intentionally inflicted mental

pain and suffering. *Id.* After the Respondents' petition for rehearing was denied, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Cir. 2006), the action was remanded to the district court in June 2006.

On September 8, 2006, the Petitioners filed their Fourth Amended Complaint, and, in response, the Respondents filed their Renewed Motion to Dismiss Fourth Amended Complaint for *Forum Non Conveniens*. In large measure, the Respondents contended that the district court was required to afford full faith and credit to the state court *forum non conveniens* judgment, and that the Petitioners were precluded from relitigating facts and issues necessarily decided by the state court's final *forum non conveniens* judgment. Following a referral of the motion to a Magistrate Judge, the Magistrate Judge issued a Report and Recommendation recommending denial of Respondents' Renewed Motion to Dismiss the Fourth Amended Complaint for *Forum Non Conveniens*, to which the Respondents objected.

On October 16, 2007, the district court rejected the Report and Recommendation and issued an Order Dismissing Complaint for *Forum Non Conveniens*. *See Villeda-Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399-civ, 2007 WL 3054986 (S.D. Fla. Oct. 16, 2007). The district court concluded that it was not precluded from reconsidering its earlier *forum non conveniens* order. *Id.* at *2. Furthermore, the district court held that, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, it was "bound by the legal and factual conclusions of the Florida state court which were essential to [the state court's] decision to grant a motion for *forum non conveniens*." *Id.* at *3. The

district court then performed a thorough review and balancing of the *forum non conveniens* factors this Court enumerated in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Villeda-Aldana*, 2007 WL 3054986, at *3-5. Concerned about the Petitioners' claims for their safety if they were required to return to Guatemala to testify in person, the district court dismissed the Fourth Amended Complaint "without prejudice to [the Petitioners'] right to seek reconsideration if any of the [Petitioners] are required to appear in person in Guatemala in order to litigate their claims." *Id.* at *6.

The Petitioners appealed the district court's *forum non conveniens* dismissal order, and the Court of Appeals affirmed. The Court of Appeals, as did the district court, applied the well-settled *Piper* and *Gilbert* interest factors and held that, given the discretionary nature of the district court's determination and the deferential level of review, the district court had not abused its discretion in concluding that the weight of the *forum non conveniens* balance heavily favored dismissal in favor of Guatemala. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1299-1300 (11th Cir. 2009), (hereinafter "*Aldana II*"). In so concluding, the Court of Appeals expressly noted that "the district court clearly recognized that, since the appellants lived in their chosen forum for the purposes of the federal analysis, this factor weighed heavily in their favor." *Id.* at 1293. The Court of Appeals further noted that the district court "explicitly acknowledged the 'strong public interest in favoring receptivity of the United States courts to [ATS and TVPA] claims.'" The Court of Appeals concluded that "the district court weighed these various factors in a reasonable fashion and

determined that Guatemala's interest was stronger than the United States." *Id.* at 1299. The Petitioners then filed a petition for rehearing and rehearing *en banc*, which the Court of Appeals denied. *See* Petition, App. C.

C. Statement of the Facts

Bandegua is a Guatemalan company that owns, leases, and operates banana farms only in Guatemala. Bandegua, at one time, operated the Bobos banana plantation in Morales, Izabal, Guatemala, where the incidents giving rise to the Petitioners' claims took place. Bandegua does not export, sell, or distribute fresh fruit or any other products into the United States and has no employees, business agents or contractors in Florida or the United States.

Petitioners are Guatemalan citizens who lived and worked in Morales, Guatemala. Petitioners were officers of a Guatemalan labor union, Sindicato de Trabajadores del Banano de Izabal ("SITRABI"), which represented the workers at the Bobos plantation. In September 1999, Bandegua announced it was closing its Bobos operations and laying off 918 plantation workers, all SITRABI members.

The Fourth Amended Complaint alleges that on October 13-14, 1999, the Petitioners were rounded up by a mob of townspeople in Morales, Guatemala, and, after being threatened at gun point, were forced to resign their positions with Bandegua and SITRABI. The Petitioners allege that the Respondents coordinated the assault. After a total of approximately eight hours, all of the Petitioners were released and none was physically injured.

Following the incident, the Guatemalan police made several arrests, and a criminal trial was conducted in Morales, Guatemala. The Petitioners testified in person at the trial against the perpetrators. During the criminal prosecution, the Guatemalan government provided housing and around-the-clock police protection to the Petitioners and their families in Guatemala City. At the conclusion of the criminal trial, the perpetrators were convicted of their crimes. Approximately seventeen months after the incident in Morales, the Petitioners, Aldana, Romero, Evans, Rodriguez, and Marel Martinez, were relocated (with the Respondents' financial and non-financial assistance) to the United States, where these Petitioners now claim to reside. More than two years after the incident, the Petitioners, Loyo Martinez and Hernandez, moved to the United States, where they now also claim to reside.

REASONS FOR DENYING THE PETITION

None of the Petitioners' flawed arguments constitutes a "compelling reason" sufficient for this Court to grant certiorari review of this matter in accordance with Rule 10 of the Rules of the Supreme Court of the United States. Contrary to the Petitioners' contentions, not only is the Court of Appeals' decision correct, its decision is not "in conflict with the decision of another United States court of appeals on the same important matter," nor has the Court of Appeals "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(a), (c).

I. There is No Split Among The Circuits As The Petitioners Simply Complain About The Application of Well-Settled *Forum Non Conveniens* Principles And Request This Court To Reweigh The Record Evidence In This Fact-Specific, Flexible, And Discretionary Inquiry.

The Petitioners' lead argument is that there is a "clear split" between the Eleventh Circuit, on the one hand, and the Second and Ninth Circuits, on the other, regarding the weight due the United States' interest in upholding its obligations under international law in a *forum non conveniens* analysis. The thrust of the Petitioners' argument is that, contrary to the decision of the Court of Appeals below, the Second and Ninth Circuits overwhelmingly disfavor *forum non conveniens* dismissals of ATS and TVPA claims. *See* Petition at 9-13. The Petitioners' argument is wrong.

First, none of the cases the Petitioners cite from the Second and Ninth Circuits supports their view. From the Ninth Circuit, the Petitioners rely on *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009) and *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008). *See* Petition at 10-11. However, *Bauman* did not involve *forum non conveniens*. Rather, *Bauman* concerned an issue of personal jurisdiction on the basis of an agency relationship. *Bauman*, 579 F.3d at 1093-94. Moreover, the Petitioners quote language from ***the dissent*** in *Bauman* concerning agency personal jurisdiction and pass it off as a "holding" regarding *forum non conveniens*. *Compare* discussion of *Bauman* in Petition at 10-11 *with* dissent by Judge Reinhardt in *Bauman*, 579 F.3d at 1104-05. Further, on May 6, 2010, the Ninth Circuit granted rehearing in *Bauman*

and vacated the appellate court's prior decision and ordered supplemental briefing on agency personal jurisdiction issues. *See Bauman v. DaimlerChrysler Corp.*, 603 F.3d 1141 (9th Cir. 2010).

Rio Tinto is similarly inapposite. *Rio Tinto*, like *Bauman*, did not involve *forum non conveniens*. Instead, *Rio Tinto* concerned whether exhaustion of local remedies is a prerequisite to invoking a United States court's jurisdiction under the ATS. *See Rio Tinto*, 550 F.3d at 824-25. Consequently, nowhere in *Rio Tinto* did the Ninth Circuit hold that "[t]he U.S. interest in addressing violations of international prohibitions disfavors dismissal of ATS and TVPA cases *on forum conveniens* grounds," as Petitioners audaciously claim. *See* Petition at 12. In fact, the Ninth Circuit has actually expressed a contrary view. *See In re Estate of Ferdinand Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) ("Such limitations as venue and the doctrine of forum non conveniens are available in § 1350 cases as in any other.")

Likewise, the Second Circuit cases relied upon by the Petitioners are of no support. For example, as noted by the Court of Appeals below, *see Aldana II*, 578 F.3d at 1299-1300 n.10, the Second Circuit in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), recognized that in TVPA cases, Congress "has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts," but acknowledged:

> This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of *forum non*

> *conveniens*. The statue has, however, communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business. The TVPA in our view expresses a policy favoring our courts' exercise of the jurisdiction conferred by the [ATS] in cases of torture unless the defendant has fully met the burden of showing that the *Gilbert* factors 'tilt strongly in favor of trial in the foreign forum.'

Id. at 106 (citation omitted).

Here, unlike the district court in *Wiwa*, which wholly "failed to count in favor of retention the interest of the United States, as expressed in the TVPA," *see id.*, the Court of Appeals acknowledged that the district court properly considered the public policy interests as articulated in *Wiwa*, *see Aldana II*, 578 F.3d at 1299, and did not abuse its discretion in nevertheless ruling that on this record the *Gilbert* factors tilted strongly in favor of a trial in Guatemala. *See id.* at 1299-1300.

Moreover, the Second Circuit's decision in *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) is also inapposite. Contrary to the Petitioners' suggestions, *Jota* did not concern a court's failure to consider the policy favoring adjudication of TVPA lawsuits in the United States. Rather, the *Jota* Court held that the *forum non conveniens* dismissal there was erroneous because the district court had failed to require the defendant to submit to jurisdiction in the alternate forum, and because the district court had adopted

another district court's weighing of the relevant factors. *Id.* at 155. The *Jota* Court explicitly stated, "[w]e express no view. . . on how the forum non conveniens balance for [ATS] claim is to be struck when alien plaintiffs select a United States forum for a suit against a domestic corporation." *Id.* at 159 n.6. The Petitioners' contention of a "clear split" among the circuits is, at best, imagined.

The reality is that, contrary to the Petitioners' contention, the federal courts consistently heed this Court's admonition that "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Piper*, 454 U.S. at 249-50. This Court has further made plain that its *forum non conveniens* decisions have "repeatedly emphasized the need to retain flexibility," *id.* at 262, and that "[e]ach case turns on its own facts." *Williams v. Green Bay & W. R. Co.*, 326 U.S. 549, 557 (1946).

Because of this need for flexibility, contrary to the Petitioners' claim, no court has ever given dispositive weight to the interest of the United States under the ATS or the TVPA or held that the *forum non conveniens* doctrine does not apply to such cases. Indeed, just the reverse is true. *See, e.g.*, *Turedi v. Coca-Cola Co.*, 343 Fed.Appx. 623 (2d Cir. 2009) (affirming *forum non conveniens* dismissal of an ATS and TVPA case against two United States companies in favor of Turkey); *Wiwa*, 226 F.3d at 106 ("This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of *forum non conveniens.*"); *In re Estate of Ferdinand Marcos*, 978 F.2d at 500 ("Such limitations as venue and the doctrine of forum non conveniens are available in

§ 1350 cases as in any other."); *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 505 n.6 (S.D.N.Y. 2005) (plaintiffs' choice of forum is not entitled to any greater deference because they have alleged ATS and TVPA claims); *United Bank for Africa PLC v. Coker*, No. 94-civ-0655, 2003 WL 22741575, at *6 (S.D.N.Y. Nov. 18, 2003) (holding even if claims are made under the ATS and TVPA, a "balance of factors [in this case] would still militate in favor of dismissal of the false imprisonment claim on *forum non conveniens* grounds"); *Robert v. Bell Helicopter Textron, Inc.*, 2002 WL 1268030, at *2 (N.D. Tex. May 31, 2002) (ATS did not preclude court from dismissing on *forum non conveniens* grounds); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 553 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002) ("The United States therefore has no special public interest, under the [ATS] or otherwise, in providing a forum for plaintiffs pursuing an international law action against a United States entity that plaintiffs can adequately pursue in the place where the violation actually occurred.").[3]

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[3] The Court of Appeals and the district court's balancing of the United States' interests in prosecuting TVPA and ATS claims against other *forum non conveniens* interests is not only consistent with and required by this Court's jurisprudence, it is also consistent with Congress' intent:

> Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. Courts, *the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred*.

H.R. Rep. No. 102 - 367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87 (emphasis added). The legislative history of the TVPA shows that congressional intent was not to bar the dismissal of any claims from the United States Courts, but rather

In short, both the Court of Appeals and the district court below conducted a traditional and complete *forum non conveniens* analysis pursuant to this Court's established and well-settled *forum non conveniens* jurisprudence and consistent with the approach of the federal courts throughout the country. Both lower courts considered whether Guatemala was an adequate alternative forum. *Aldana II*, 578 F.3d 1289-92; *cf. Piper*, 454 U.S. at 254 n.22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."). Both courts undertook a thorough examination and weighing of the relevant *Gilbert* private interest factors, *Aldana II*, 578 F.3d at 1292-98, and public interest factors, including an explicit discussion and weighing of the United States' interest in adjudicating ATS and TVPA claims. *Id.* at 1298-1300. Simply put, there is no split between the Eleventh Circuit and its sister circuits.

In truth, the Petitioners' argument is but a last-ditch attempt to have this Court reweigh the evidence carefully examined and balanced twice before by the Court of Appeals and the district court in this immensely fact-bound, flexible, and discretionary analysis. This is precisely a task this Court ought not perform. *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see Graver Tank & Mfg. Co. v. Linde Air Prods., Co.*, 336 U.S. 271, 275

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to "avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." H.R. Rep. No. 102 - 367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88.

(1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). *See also* Sup. Ct. R. 10(c) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Accordingly, the Petition should be denied.

II. The Court Of Appeals' Consideration Of The *Forum Non Conveniens* Factors Is Consistent With Well-Established Principles As There Is No Paramount Public Policy Interest In "Accountability" To Deny Dismissal On *Forum Non Conveniens* Grounds.

The Petitioners contend, entirely without support and for the first time in their Petition, that the United States has an overwhelming interest in the "accountability" of its citizens that somehow mandates rejection of a *forum non conveniens* motion where the United States is the defendant's home forum and the plaintiff is a United States resident. *See* Petition at 13-17. The Petitioners also claim that the Court of Appeals' decision conflicts with the decisions of other Circuits and undermines this alleged dominant interest of the United States. *Id.* The argument has no merit.

First, the Court should flatly reject the argument because neither court below ever had an opportunity to consider it. "This Court sits as a court of review. It

is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also United States v. Williams*, 504 U.S. 36, 41 (1992) (The Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (internal citation omitted); *United States v. Lovasco*, 431 U.S. 783, 788 (1977) (argument not raised in the district court or the Court of Appeals will not be reviewed absent exceptional circumstances). There is nothing exceptional about this case or the Petitioners' untimely argument to merit further consideration.

Second, contrary to the Petitioners implication, no court has ever announced or applied, in an ATS, TVPA or any other case, a rigid rule that a U.S. court can never decline jurisdiction under *forum non conveniens* in a suit between U.S. persons or entities, irrespective of the underlying facts or circumstances. Indeed, this Court has explicitly refused to lay down any unbending rule in the *forum non conveniens* context. *Piper*, 454 U.S. at 249 (Court announces that it has refused to "lay down a rigid rule to govern discretion, and that '[e]ach case turns on its facts.'").

In fact, the Second Circuit's decision in *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003), which Petitioners erroneously cite in support, reinforces this very point. "A court considering a motion for dismissal on the grounds of *forum non conveniens* does not assign 'talismanic significance to the citizenship or residence of the parties,' and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their

causes dismissed for *forum non conveniens*." *Id.* at 73 (citation omitted). This is true even where a plaintiff chooses the home forum of a United States defendant.

Nonetheless, the Petitioners incorrectly cite *Pollux* for the proposition that "the fact that the U.S. is the Respondents' home forum must be afforded significant weight," Petition at 15, when in fact, the *Pollux* court stated that such a circumstance "only merits heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum." *Pollux*, 329 F.3d at 74. Importantly, nowhere did the Second Circuit hold that a court should eschew the balancing of private and public interest factors simply because a plaintiff chose a U.S. defendant's home forum.

> Although a plaintiff's choice of forum will not necessarily merit less deference because plaintiff is suing outside her home forum, such a choice made to obtain jurisdiction over defendant is an instance where substantial deference would still generally be appropriate. *But, it is an untenable leap of logic to jump from that holding to the blanket assertion that a plaintiff's choice of forum deserves presumptive deference simply because the chosen forum is defendant's home forum. . . . [A] plaintiff's choice to initiate suit in the defendant's home forum – as opposed to any other where the defendant is amenable to suit – only merits heightened deference to the extent the plaintiff and the case possess bona fide connections to, and convenience factors favor, that forum.*

Id. at 74 (emphasis added). In the end, the Second Circuit affirmed the district court's dismissal of the case for *forum non conveniens* despite the fact that it was brought in the defendant, Chase Manhattan Bank's, home forum. *Id.* at 67-68, 77.

The remaining case law the Petitioners cite for support is inapposite,[4] unremarkable,[5] or distinguishable.[6] Simply put, no case the Petitioners

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[4] *Garrity v. United States*, 67 F. Supp. 821 (Ct. Cl. 1946), involved a landlord-tenant dispute with no discussion whatsoever of *forum non conveniens*. In *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009), on appeal from a dismissal of the action by the district court on *forum non conveniens* grounds, the defendant/appellee did not seek affirmance of the dismissal due to developments in the alternate forum, and the appellate court granted the plaintiff/appellant's request to remand the matter to the district court without ruling on the issue, aside from providing "guidance" in dicta. *Id.* at 189.

[5] *Founding Church of Scientology of Washington, D.C. v. Verlag*, 536 F.2d 429 (D.C. Cir. 1976) and *Horovitz v. Renault, Inc.*, 162 F. Supp. 344 (S.D.N.Y. 1958), involved, respectively, a reversal and a denial of dismissal on grounds of *forum non conveniens* for fact-based reasons, without making significant pronouncements in the law.

[6] In *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006), the appellate court reversed dismissal on *forum non conveniens* grounds because the district court, in balancing the conveniences, gave "the plaintiff's choice of forum no weight whatsoever." *Id.* at 179-80. Likewise, in *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1898), and *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991), the district court, respectively, failed to explain what deference it was giving the plaintiff's choice of forum, or gave it very little weight. That was not the case with the district court below.

cite stands for the proposition that the United States has an overwhelming interest in the accountability of its citizens or even that a U.S. court cannot dismiss an action on *forum non conveniens* grounds in a suit between U.S. persons or entities. There is, of course, no conflict of any kind among the Circuit Courts regarding this issue.

The fact is that the *forum non conveniens* doctrine applies in full measure in ATS and TVPA cases, and in cases involving U.S. resident plaintiffs and defendants. Cases with differing results are due to the doctrine's inherent and indispensable flexibility and the unique facts and circumstances of each case. That, of course, is as it should be. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 528-29 (1988) ("As we previously have recognized, the district court is accorded substantial flexibility in evaluating a *forum non conveniens* motion . . . and each case turns on its facts.") (internal quotations omitted); *see also Piper*, 454 U.S. at 249-50.

Accordingly, the Petition should be denied.

III. The Court Of Appeals Afforded Proper Weight To The Petitioners' Choice Of Forum, And There Is No Split Or Need For This Court To Revisit *Piper* And *Gilbert*.

The Petitioners finally argue that the Court of Appeals failed "to accord proper weight to Petitioners' choice of forum," thereby contravening this Court's holding in *Gilbert*, 330 U.S. 501, and creating a "conflict with other circuits which have held that the U.S. residence of a plaintiff is a significant private interest factor that must be taken into consideration in

a *forum non conveniens* inquiry." Petition at 17. The Petitioners' contention is simply wrong, and the Court of Appeals' decision is not in conflict with any of decision of its sister courts.

This Court long ago said that "the distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified" and that "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." *Piper*, 454 U.S. at 255. But, this Court further explained that:

> [a] citizen's forum choice should not be given dispositive weight, however. Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his own forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

Id. at 255-56 & n.23 (citations omitted).

The Court of Appeals and the district court applied these well-settled principles and accorded the heightened deference due the Petitioners' choice of forum. The Court of Appeals said:

> The district court clearly recognized that, since the appellants lived in their chosen forum for purpose of the federal analysis, this factor weighed heavily in their favor. The district court squarely took account

> of our requirement that there be positive evidence of unusually extreme circumstances, and that the court be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.

See Aldana II, 578 F.3d at 1293-94 (internal quotations omitted). The Petitioners' disingenuous claim that the Court of Appeals contravened *Gilbert* for failing to accord due weight to the Petitioners' choice of forum, *see* Petition at 17-18, is well wide of the mark. Moreover, aside from citing the Second Circuit's decision in *Wiwa*, 226 F.3d 88, *which is not in conflict with the Court of Appeals' decision in this case*, *see supra* at 12-13, the Petitioners fail to identify a single conflict with the Court of Appeal's decision.

Similarly lacking in merit is Petitioners' argument that this Court grant certiorari to "clarify the weight to be accorded a non-citizen U.S. resident's choice of forum" in ATS and TVPA cases based on the same facts supporting asylum. Petition at 20. For reasons already discussed, the Court's *forum non conveniens* pronouncements on the deference due a domestic plaintiff's forum choice are well-settled and more than adequately answer the question Petitioners submit. *See Piper*, 454 U.S. at 255. The Petitioners have utterly failed to articulate any reason, never mind a compelling reason, for the Court to revisit this well-settled law.

Moreover, this Court should refuse to exercise its extraordinary certiorari jurisdiction to address a

question that only can arise on the rarest occasions when an alien who has been granted asylum in the United States files an ATS and TVPA suit against a U.S. company based on facts that lead to the grant of asylum. This extremely limited issue does not warrant the Court's review. *See Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.").

In addition, the Petitioners' request is another red herring. It is based on the supposed need for the district court to consider and protect the Petitioners' safety. However, as the Court of Appeals correctly noted in reviewing the district court's analysis concerning the adequacy of the Guatemalan forum, *see Aldana II*, 578 F.3d at 1288 & 1291 n.3, the Petitioners' safety was "effectively addressed" when the district court's dismissal was expressly conditioned upon the Petitioner's "'right to seek reconsideration if any of the [Petitioners] are required to appear in person in Guatemala in order to litigate their claims.'" *See Villeda-Aldana*, 2007 WL 3054986, at *6.

Finally, the Petition ends, much as it begins, with an erroneous argument in direct conflict with the record. The Petitioners' assertion that the "undue delay and prejudice to the Petitioners should have been among the factors weighed in any *forum non conveniens* analysis," stands in stark contrast to the fact that the Court of Appeals explicitly addressed the

Petitioners' argument regarding delay, *Aldana II*, 578 F.3d at 1296-97, and did so even though the Petitioners failed to raise the argument before the district court below. *Aldana II*, 578 F.3d at 1296 & n.6. Nothing in the Petitioners' last argument, or any of their arguments, warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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